

RECEIVED

MAY - 6 1994

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the matters of )  
)  
Application of )  
)  
CAPITOL RADIOTELEPHONE, INC. )  
d/b/a CAPITOL PAGING )  
)  
For a Private Carrier Paging )  
Facility on 152.480 MHz in )  
Huntington/Charleston, WV )  
)  
Imposition of Forfeiture re )  
)  
CAPITOL RADIOTELEPHONE, INC. )  
d/b/a CAPITOL PAGING )  
)  
Former Licensee of Station )  
WNSX646 in the PLMRS )  
)  
Revocation of Licenses of )  
)  
CAPITOL RADIO TELEPHONE, INC. )  
d/b/a CAPITOL PAGING )  
)  
Licensee of Stations WND400 )  
and WNW636 in the PLMRS )  
)  
Revocation of Licenses of )  
)  
CAPITOL RADIOTELEPHONE COMPA- )  
NY, INC. d/b/a CAPITOL PAGING )  
)  
Licensee of Stations KWU373, )  
KUS223, KQD614 and KWU204 in )  
the PMRS )

PR Docket No. 93-231

To: Administrative Law Judge Joseph Chachkin

**CAPITOL RADIOTELEPHONE COMPANY, INC.**  
**REPLY TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Kenneth E. Hardman  
MOIR & HARDMAN  
2000 L Street, N.W., Suite 512  
Washington, D.C. 20036  
Telephone: 202-223-3772  
Facsimile: 202-833-2416

One of the Attorneys for  
Capitol Radiotelephone  
Company, Inc.

May 6, 1994

No. of Copies rec'd  
List ABCDE

056

## TABLE OF CONTENTS

	<u>Page</u>
SUMMARY .....	2
REPLY TO PROPOSED CONCLUSIONS .....	5
A.    PRB's Position is Fatally Undercut by its Utter Failure to Show a Credible Motive for Capitol's Alleged Scheme .....	5
B.    PRB's Rampant Speculation in lieu of Probative Evidence Cannot Sustain its Position .....	10
CONCLUSION .....	25
CERTIFICATE OF SERVICE .....	26

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the matters of	)	
Application of	)	
CAPITOL RADIOTELEPHONE, INC.	)	PR Docket No. 93-231
d/b/a CAPITOL PAGING	)	
For a Private Carrier Paging	)	
Facility on 152.480 MHz in	)	
Huntington/Charleston, WV	)	
Imposition of Forfeiture re	)	
CAPITOL RADIOTELEPHONE, INC.	)	
d/b/a CAPITOL PAGING	)	
Former Licensee of Station	)	
WNSX646 in the PLMRS	)	
Revocation of Licenses of	)	
CAPITOL RADIO TELEPHONE, INC.	)	
d/b/a CAPITOL PAGING	)	
Licensee of Stations WNDA400	)	
and WNNW636 in the PLMRS	)	
Revocation of Licenses of	)	
CAPITOL RADIOTELEPHONE COMPA-	)	
NY, INC. d/b/a CAPITOL PAGING	)	
Licensee of Stations KWU373,	)	
KUS223, KQD614 and KWU204 in	)	
the PMRS	)	

To: Administrative Law Judge Joseph Chachkin

REPLY TO PROPOSED FINDINGS  
OF FACT AND CONCLUSIONS OF LAW

CAPITOL RADIOTELEPHONE COMPANY, INC. (a/k/a Capitol Radiotelephone, Inc. or Capitol Radio Telephone, Inc.) d/b/a CAPITOL PAGING ("Capitol"), by its attorneys, respectfully replies to the proposed findings of fact and conclusions of

law submitted to the Presiding Judge in the captioned proceeding on April 8, 1994 by the Private Radio Bureau (PRB) and RAM Technologies, Inc. (RAM). As demonstrated more fully below, the proposed findings and conclusions submitted by those parties are fatally flawed, inter alia, by their total failure to even acknowledge, much less account for, the substantial body of evidence in the record adverse to their position; by their misapplication of the burden of proof in this case and the evidentiary inferences that may properly be drawn from the failure to adduce particular testimony; and, perhaps most importantly, by their flagrant and liberal substitution of uninformed and erroneous speculation for evidence. Accordingly, their proposed findings and conclusions should be rejected, except to the limited extent some of their background findings may help to flesh out the ultimate decision in this case.

#### SUMMARY

PRB continues to cling blindly to its position, originally advanced in the Hearing Designation Order,<sup>1</sup> that Capitol engaged in its PCP business merely to cause interference to RAM. Not only does the evidence fail to establish any credible motive for such a theory (and PRB does not and cannot supply one), but PRB also maintains its position

---

<sup>1</sup> Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing, FCC 93-381, adopted August 3, 1993 and released August 31, 1993, 8 FCC Rcd 6300 (FCC 1993), hereinafter sometimes cited as the "Hearing Designation Order" or "HDO".

only by wholly ignoring (or twisting beyond recognition) the evidence which directly refutes it.<sup>2</sup>

PRB's attempt to attribute inconsistent or untruthful statements to Witnesses Raymond and Harrison concerning Capitol's testing during the inspector's field trip to Charleston is particularly unfair, uninformed and unwarranted. PRB had every opportunity to confront these witnesses with alleged inconsistencies in their statements or other matters of concern to PRB, but PRB failed to do so. Instead, PRB improperly speculates that their testimony has inconsistencies when in fact they do not.

Additionally, PRB improperly attempts to draw adverse inferences from the failure of William D. Stone to testify, because PRB and not Capitol has the burden of proof in this case. More importantly, the claimed basis for such adverse inference wholly evaporates in any event upon reasonable scrutiny. This is so because to the extent the statements attributed to him are material at all, there is no inconsistency or untruthfulness in them, contrary to PRB's speculation.

---

<sup>2</sup> It is also telling that PRB found it necessary to abandon material allegations made in the HDO. For example, a key allegation in the HDO is that Capitol's inhibitor had a "totally functioning front panel squelch control" which rendered the equipment substandard for purposes of channel monitoring. (HDO at ¶12 & n. 23). The claim was the result of an error by FCC staff (CAP-21), and PRB has abandoned it. Similarly, PRB abandoned the HDO's claim of misrepresentation in connection with Greenup County Rescue Squad (HDO at ¶19), although it then strained to try to find other (baseless) allegations as substitutes.

Finally, a general comment is warranted concerning the manner in which PRB and Capitol tried their respective cases in this proceeding. PRB put on its substantive evidence almost entirely through oral testimony of witnesses, with minimal or no meaningful disclosure of their testimony during the exchange of direct cases. Nonetheless, Capitol was ready and able at the hearing to proffer rebuttal evidence to the extent necessary and appropriate.

On the other hand, Capitol fully disclosed its direct case -- including written direct testimony for all of its witnesses -- on January 18, 1994, fully two weeks before the hearing began. PRB knew exactly what Capitol's case was and had every opportunity to adduce as much rebuttal testimony and other evidence as it deemed appropriate. PRB nonetheless chose to call only Witness Walker on rebuttal, who basically reiterated his direct testimony rather than contradicted Capitol's evidence.

Having had such a generous opportunity to give Capitol's evidence PRB's best shot on rebuttal, it is especially inappropriate and improper for PRB to rely so pervasively upon abject speculation, rather than evidence, to support its position. In fact, PRB's almost total failure to even offer any rebuttal evidence raises the compelling inference that it was unable to do so. That fact alone properly should destroy PRB's unwarranted speculation in its last

ditch attempt to avoid the force of the overwhelming evidence adduced in Capitol's favor herein.

#### REPLY TO PROPOSED CONCLUSIONS

A. PRB's Position is Fatally Undercut by its Utter Failure to Show a Credible Motive for Capitol's Alleged Scheme.

1. To set the stage for its subsequent conclusions, PRB first claims that RAM and Capitol "compet[e] for the same group of customers," and that Capitol's motive for the alleged scheme to interfere "was to disrupt RAM's business in the hopes of attracting customers to its competing RCC service." (PRB Findings at ¶¶1-2). Such glib and sophomoric analysis -- based on its own speculation and not evidence -- illustrates why PRB has so utterly and completely erred in its handling of this entire case.<sup>3</sup>

2. The evidence shows that when Capitol decided to enter the PCP business, it was charging approximately \$30.00 per month per unit for its RCC transmission service and equipment, while RAM was charging somewhere on the order of

---

<sup>3</sup> Although RAM's proposed conclusions similarly are not supported by the evidentiary record, there is no need to separately address its multiple analytical errors. However, Capitol will note that the accuracy of RAM's arguments can aptly be measured by its pious claim that Capitol is the only party with which RAM has ever had any trouble sharing channels. (RAM Findings at ¶92) ("RAM had operated on this shared channel in harmony with other licensees prior to Capitol's installation of its PCP station"). Quite to the contrary, the evidence shows that other licensees had complained that RAM was operating in violation of the rules (CAP-18 at p. 9; CAP-12 at pp. 7-8). With noteworthy similarity to its actions in this case, RAM responded with harsh allegations that the licensee was merely causing interference to RAM. (CAP-18 at p. 22).

\$6.00 per month for its PCP service. (E.g., Raymond Tr. 871). Not surprisingly, at such a low price RAM was experiencing rapid growth and claimed to have approximately 4,800 pagers in service during January 1990,<sup>4</sup> while NABER had Capitol's coordination request under consideration. (CAP-18, p. 1).

3. During the same time, however, it is uncontradicted that Capitol likewise was experiencing unprecedented growth for its much higher-priced RCC paging service. (Raymond Tr. 831, 871). Therefore, there was no financial reason why Capitol should be unduly concerned about RAM's PCP service.

4. Equally importantly, as Witness Raymond explained repeatedly, the entire theory behind establishing a "budget" paging service, such as its PCP service, is to be able to offer service to customers that otherwise would not subscribe to Capitol's RCC service -- either because they could not afford or would not choose to pay the price. Stated differently, the PCP service was targeted at a different market niche than Capitol's RCC service -- a niche for which the RCC service is not realistically competitive at all due to its price.

---

<sup>4</sup> An indeterminate number of these customers evidently were network customers rather than local RAM customers, thus further reducing the average revenue per customer actually realized by RAM.



5. Accordingly, while it is true that RAM and Capitol were both competitors in the paging business in a general sense, it is not true as a general proposition that Capitol's RCC service and RAM's PCP service effectively competed "for the same group of customers" as speculated by PRB. In fact, the different pricing strategies adopted by RAM and Capitol resulted in serving somewhat different niches of the paging market. Not surprisingly, both carriers were serving their respective niches successfully and were growing rapidly as a result.

6. Thus, it would have been entirely pointless for Capitol to have engaged in such a scheme as alleged by PRB. Assuming arguendo that Capitol's actions would have had the effect of driving any of RAM's customers off its system,<sup>5</sup> the fact remains that any such customers would not have then become customers of Capitol's RCC system due to its price. Thus, PRB's major premise is flatly belied by the evidence in this case.

7. Its theory does not make any sense for other reasons as well. Capitol has been in the paging business and an FCC license for 30 years; and competition certainly is not new to it. Why RAM's appearance on the scene should suddenly cause Capitol to assume such a new and bizarrely different character has never been explained.

---

<sup>5</sup> The only evidence is that RAM continues to experience rapid growth.

8. Moreover, this alleged scheme occurred in the midst of unprecedented growth and success of Capitol's RCC paging business, by far the biggest part of its business. Why Capitol would jeopardize its large and successful business by attempting to cause interference to a company that was not in fact causing Capitol any measurable competitive harm is again wholly unexplained.

9. Finally, in this regard, even assuming *arguendo* that Capitol would have sought to engage in such a scheme as PRB alleges (which it did not), it is totally implausible that Capitol would have engaged in the particular conduct alleged in this case. As both Witnesses Walker and Peters confirmed, dealing with interference problems from time to time are simply a fact of life in radio-based services such as paging, and it is rare that such interference is deliberately caused.

10. As Witness Bobbitt himself admitted, interference that is actually harmful or destructive in paging is the simultaneous transmission (i.e., "walking" on another licensee's transmissions); minor delays in transmissions are not significant. Yet, in this case the most serious allegations against Capitol center around transmissions that occurred during otherwise unoccupied channel time. When RAM or other licensees were transmitting, the alleged "interference" by Capitol was held until channel time became available.

11. It is implausible enough that Capitol would have attempted to interfere with RAM in any case, in light of all the circumstances shown by the evidence of record. But even assuming arguendo that it would have attempted to do so, contrary to all logic and reason, it is absolutely incredible that Capitol would have done so with such obviously ineffective and pointless actions.

12. Even if the FCC had not interceded and the transmissions had continued indefinitely, the fact remains that the allegedly interfering transmissions would not have had any measurable adverse competitive impact on RAM whatsoever. In turn, in the absence of at least the realistic threat of some competitive harm to RAM from the conduct in question, it defies all logic and reason to suggest that Capitol engaged in such conduct "in the hopes of attracting [RAM's] customers to [Capitol's] competing RCC service."<sup>6</sup>

13. In short, PRB has yet to even suggest a credible motive for the scheme it alleges, much less demonstrate such motive by evidence. On the other hand, RAM's motives for attempting to run Capitol off the PCP channel, and fabricat-

---

<sup>6</sup> In this regard, Capitol is constrained to point out that PRB cites the testimony of Witness Moyer as evidentiary support for the finding that the alleged interference stopped "for good" in "September 1993," and that, according to Witness Moyer, "'We haven't had a problem since'". (PRB Findings at ¶73). Of course, what Witness Moyer actually testified was that the interference stopped approximately 30 days before the start of the hearing, i.e., around Christmas 1993. (Moyer Tr. 77, 97-98, 106). This again illustrates PRB's penchant for playing fast and loose with the record.

ing complaints of interference in order to do so, are clear and unassailable, as demonstrated by Capitol's proposed findings and conclusions. On this basis alone, PRB's position should be rejected as inherently unpersuasive.

B. PRB's Rampant Speculation in lieu of Probative Evidence Cannot Sustain its Position.

14. The second major flaw in PRB's case is that it repeatedly speculates about facts to support its arguments, rather than relying on the evidence of record. In other instances it simply mischaracterizes the evidence when convenient. Capitol illustrates below the principal instances of this improper tactic.<sup>7</sup>

15. At ¶4 of its proposed conclusion, PRB speculates that the test tones transmitted by Capitol during the inspectors' field trip to Charleston ran "around the clock without being turned off during the days [the inspectors] were there". The evidence, however, is that the inspectors testified that they heard the tone transmissions whenever they monitored 152.48 MHz during their field trip, which was by no means "around the clock". Witness Walker also testified that they heard the tones one night as late as midnight. (E.g., Walker Tr. 1439). There is thus no reasonable justification for PRB's claim that the tone transmis-

---

<sup>7</sup> In a number of the cases, the relevance of PRB's particular claim in any event is not apparent. Thus, no useful purpose would be served by attempting to do an exhaustive correction of PRB's errors in its proposed findings and conclusions.

sions occurred "around the clock without being turned off" while the inspectors were in Charleston.<sup>8</sup>

16. PRB also speculates that the tone testing "could not have been for the Greenup County Rescue Squad which Capitol said required group call for 10-15 pagers". (PRB Findings at ¶6). It is not clear from its discussion what specific inference PRB would draw from this premise, even if true; thus the relevance of the claim is not established in any event. The fact is, however, that PRB never asked Witness Harrison about this issue when they had him on the stand; nor did the inspectors ask him about the testing during the inspection. Had they done so, of course, there would be evidence in the record on the point, and not just PRB's uninformed speculation on the matter.<sup>9</sup>

17. PRB also claims that "Capitol never identified any real purpose for the tests". (PRB Findings at ¶7). This is absolutely false. Among others, Witness Raymond explained at some length in response to PRB's questions the purposes

---

<sup>8</sup> PRB's speculation is also contradicted by Witness Harrison's testimony that Capitol did not do its testing around the clock. (Harrison Tr. 696-7).

<sup>9</sup> Witness Walker acknowledged that Witness Harrison appeared to be totally open and candid about Capitol's operation, including the testing, during their inspection. (E.g., Walker Tr. 161). Yet Walker did not think this issue was important enough to question Harrison about it during the inspection. (See, e.g., Walker Tr. 1475-6). In light of the failure both of the inspectors and PRB's counsel to explore this matter at the time they had the opportunity to do so, it is singularly inappropriate for PRB to now speculate about the implication of particular, unrelated, snippets of evidence.

of the tests. (E.g., Raymond Tr. 1312-1315). Even PRB's own witness admitted that the transmissions were a "viable means of testing," although he felt they were excessive in number. (Walker Tr. 130; see, also, Walker Tr. 180, affirming the legitimacy of testing for all of the reasons identified by Witness Raymond). There is thus no credible basis for PRB's claim that the tone transmissions were purposeless as tests.<sup>10</sup>

18. PRB also speculates that Witness Harrison could not have been legitimately testing the PCP system on his way home from the office, because the PCP system did not provide continuous coverage between Huntington (where Harrison's office was located) and Charleston (where his home was located). (PRB Findings at ¶ 8). However, the legitimacy of testing for both range and coverage is beyond reasonable dispute. (See, e.g., Walker Tr. 180). It is intuitively obvious, therefore, that more testing -- not less -- would be required when there is not continuous coverage between Huntington and Charleston.

19. That is, since Capitol provided limited coverage on its PCP system around both Huntington and Charleston, and

---

<sup>10</sup> In the same paragraph PRB would conclude that William D. Stone, president and controlling stockholder of Capitol, "lied to the Commission engineers" by identifying two different purposes for testing, i.e., testing the "link frequency" and testing for "coverage". However, as PRB's own witness admitted, both purposes are legitimate (Walker Tr. 180); and there is thus no basis for concluding that either was a lie as claimed by PRB.

since the terrain in the area is mountainous and unusually difficult to adequately cover, more testing than "normal" would obviously be required in order for Capitol to determine exactly what the limits of reliable coverage are between the two cities, and where any "pockets" in the coverage may be. Again, PRB's abject speculation is totally off the mark and in any event cannot properly be substituted for probative evidence of record.

20. Similarly uninformed and improper is PRB's speculation that the alleged "low power" of the Huntington transmitter precluded the tone testing from being legitimate tests for the Greenup County Rescue Squad, because it is located 10 to 15 miles from Huntington. (PRB Findings at ¶ 8). PRB does not cite to the record for this assertion, but presumably is relying on the testimony of Witness Harrison for its geographical "facts," because his testimony is the only evidence on the point that Capitol can recall.

21. However, Witness Harrison expressly qualified his testimony by stating that "[a]ir miles, I would have to guess probably 10 to 15. I'm not sure. I've never had anybody tell me for sure, but that's what I would assume." (Harrison Tr. 741). A "guess" is not competent evidence. It is thus patently improper for PRB to proffer that guess as evidentiary "fact," regardless of whether the guess turns out to be right or wrong.

22. Moreover, by simple reference to a map<sup>11</sup> it can be discerned that Raceland, KY (where Harrison believed the Rescue Squad to be located) is located up the river from Huntington, KY. Had PRB troubled to adduce evidence on the issue, rather than its own uninformed speculation, it would have learned that river valleys are prime conduits for radio signals. This fact, again, illustrates why it is wholly improper for PRB to merely speculate -- in lieu of introducing evidence -- whether Capitol's Huntington's transmitter would have been unable to provide reasonable coverage for the Rescue Squad.<sup>12</sup>

23. PRB also attempts to fault Capitol for "not identify[ing] a customer for whom it was testing," for being unable to explain the length of the tests, and for repeating the first tone in a page. (PRB Findings at ¶¶9-10). In substance, PRB would fault Capitol's witnesses for being unable to recall -- some two and one half years after the fact -- specific customers for which testing was occurring between August 12-15, 1991.

24. This is decidedly unfair and unreasonable, both given the length of time that elapsed and given the fact

---

<sup>11</sup> See, e.g., 1994 AAA Road Atlas at p. 45 (state map of Kentucky).

<sup>12</sup> Also, contrary to PRB's claim that the power of Capitol's system was inadequate, Witness Peters testified that it was entirely adequate for the intended purpose (Peters Tr. 1092-3), and this testimony was not disputed by PRB's own experts.



that testing is not necessarily related to a specific customer. Also, Witness Peters testified forcefully that the amount of testing by Capitol was not excessive (Peters Tr. 1125, 1130, 1142-3, 1179-82). This testimony necessarily refutes PRB's claim that the length of the tests was not justified in the record.

25. Moreover, the "repeat" function for a page is different than the "chain" function.<sup>13</sup> Purely as an intuitive matter, if a voice page is part of a chain and voice pages typically or often are repeated in regular commercial service (which they are), there is no reason to question the legitimacy of testing the "repeat" function itself as part of an overall test of the chaining function. And this is particularly so since Capitol was never able to determine exactly why the chaining process broke down when pages were initiated. Again, in the absence of its having brought the matter up on the evidentiary record (and PRB did not), it is wholly improper for PRB to speculate about facts, and then draw adverse inferences from its own uninformed speculation.

26. PRB also claims, erroneously, that "Capitol affirmatively admitted ... violation [of Section 90.405(a)(3) of the rules]". (PRB Findings at ¶11). The evidence actually is quite different than PRB's characterization (see CAP-01

---

<sup>13</sup> As a parenthetical matter, Capitol points out that PRB erroneously equates "chaining" with "group call". (PRB Findings at ¶15). (Compare Raymond Tr. 1332-3).

at p. 24), and does not support either a finding of violation of that rule or the imposition of a forfeiture.<sup>14</sup>

27. PRB also claims, erroneously, that its "engineers observed Capitol transmitting willful interference". (PRB Findings at ¶13). Its position is destroyed by the testimony of its own witnesses, who admitted that the tone transmissions were legitimate test transmissions, notwithstanding their view that the amount of testing involved was excessive (Walker Tr. 130, 180), and who believed that Capitol did not knowingly transmit while RAM was transmitting. (Walker Tr. 172).

28. Moreover, PRB unfairly characterizes Witness Peters' testimony on excessive testing (PRB Findings at ¶13), because Peters did not believe Capitol engaged in excessive testing in this case. Further, PRB's attempt to analogize this case to previous incidents where spectrum was monopolized is plainly misplaced, because the evidence is uncontradicted that Capitol never transmitted for more than

---

<sup>14</sup> Parenthetically, Capitol notes that PRB also erroneously claims that there is no evidence in the record pertaining to the downward adjustment of forfeitures in this case. (PRB Findings at ¶16 & n. 22). Since the evidence otherwise shows that no forfeiture is warranted in any event, the issue is irrelevant. However, Capitol is constrained to point out that PRB introduced Capitol's rebuttal statement into the record as PRB-13, which provides evidence on the adjustment criteria, contrary to PRB's claim.

brief periods at a time before relinquishing the channel for use by other licensees.<sup>15</sup>

29. PRB also erroneously attempts to find William D. Stone guilty of lack of candor and/or misrepresentation because Marshall University was not listed as a PCP customer on any documents subsequently provided to the FCC as PCP customer lists. (PRB Findings at ¶21). However, this claim is based solely on evidence adduced by Witness Walker, who could not remember exactly how he phrased his question to Stone, nor did he know whether Stone understood him to be referring by his inquiry only to PCP paging customers rather than paging customers in general. (Walker Tr. 164-5). Again, PRB's characterization of the "facts" simply is not supported by the evidentiary record in this case.<sup>16</sup>

---

<sup>15</sup> PRB's reliance on Henry C. Armstrong, III, 92 FCC 2d 491 (I.D. 1982), aff'd 92 FCC 2d 485 (Rev. Bd. 1983), and Gary W. Kerr, 91 FCC 2d 110 (I.D. 1982), aff'd 91 FCC 2d 107 (Rev. Bd. 1982), thus is wholly misplaced on their facts alone. What the line of cases cited by PRB does show, of course, is that findings of harmful interference for purposes of FCC rule violations has been confined historically to instances of intentional and repeated "jamming" or "walking" on transmissions of other licensees. That is not the situation in this case, thereby undercutting PRB's position.

<sup>16</sup> PRB also egregiously misapplies precedent when it claims that Lee Optical, 2 FCC Rcd 5480 (Rev. Bd. 1987), and WNST Radio, Inc., 70 FCC 2d 1036 (Rev. Bd. 1978), support the drawing of an adverse inference from Stone's failure to testify in this case. (See, e.g., PRB Findings at ¶5). As both of those cases make clear, such an inference is appropriate if the party against whom the inference is drawn has the burden of proof. See 2 FCC Rcd at 5486 & ¶21 ("After all, C.E. had the burden of proof ... and must bear the consequences of failing to introduce evidence which might have been helpful to it"); 70 FCC 2d at 1041. (Emphasis added). In this case PRB has the burden of proof on all

30. PRB also erroneously attempts to discredit testimony by Witness Raymond concerning the manner in which customer lists had to be prepared in response to various FCC requests. (PRB Findings at ¶23). It does so by claiming that Capitol's paging terminal "could be searched for PCP subscriber numbers and the numbers manually cross referenced with the billing system," thus abrogating any need to "search through several filing cabinets". (Id.).

31. What PRB fails to acknowledge, of course, is that the various requests to which Raymond was referring in his testimony did not occur until at least several months after the fact. (See PRB-10). Given the turnover of customers that occurred in the meantime, there is no way that searching the paging terminal in June 1992 could have produced meaningful information about Capitol's first 10 customers in the Spring of 1991 (PRB-10 at ¶12) or the customers on the system during August 12-15, 1991 (PRB-10 at ¶13). In short, PRB has again substituted its own uninformed speculation for evidence in this case.

32. PRB also improperly speculates that Capitol's PCP station "equipment was inadequate, showing its lack of intent to serve PCP customers," first comparing the number of PCP transmitters to the number of Capitol's RCC transmitters, and then claiming that the "low power transmitters

---

cannot invert it by attempting to draw inferences from an alleged failure of Capitol to introduce evidence.

guaranteed a restricted coverage area and undependable reception of pages." (PRB Findings at ¶24). (Emphasis added). PRB further speculates that "the obvious explanation" for the undependable service Capitol experienced was that its pages "were being transmitted at 76 watts instead of 350 watts." (PRB Findings at ¶25).

33. Quite to the contrary of PRB's uninformed speculation, Witness Peters testified that the power of Capitol's transmitters was adequate for their stated purpose (Peters Tr. 1092-3), testimony which was not disputed by PRB's witness on rebuttal. Further, had PRB troubled to adduce evidence on the subject, rather than its own speculation, it would have learned that transmitter power does not affect the reliability of reception within its designated coverage area -- rather, it affects the size (i.e., the radius) of the area within which reliable reception can be expected.<sup>17</sup> Since Capitol expressly intended to serve a more limited area with its PCP system to begin with, neither the power of the transmitters selected nor the fact of restricted coverage has any probative value whatsoever in demonstrating some sort of sinister motive by Capitol.

---

<sup>17</sup> As a hypothetical example, a 100 watt transmitter might provide reliable coverage for a radius of 10 miles around the transmitter, compared to, say, a radius of 15 miles for a 350 watt transmitter. But within that 10 mile radius, the reception would be just as reliable for the 100 watt transmitter as the reception would be within the 15 mile radius in the case of a 350 watt transmitter.

34. Similarly, the fact that Capitol had fewer transmitters on its PCP system than its RCC system again proves absolute nothing material to this case. Capitol's RCC system is a wide area system, a necessary incident of which is essentially continuous or "seamless" coverage throughout the wide area. Thus, with such system Capitol would ordinarily be expected to cover not only the metropolitan areas themselves, as the PCP also was attempting to do, but also the area in between. That characteristic of itself would require Capitol to use more transmitters for its RCC system than for its PCP system in the same area, without implying any inadequacy at all in the PCP transmitters.

35. PCP also erroneously and unfairly attempts to blow up the test paging incident at Capitol's office into some sort of misrepresentation or lack of candor. (PRB Findings at ¶¶26-29, 31-32). That incident was thoroughly explored on the record, after which the Presiding Judge expressly concluded that PRB's attempt to show something sinister by that incident "doesn't make sense". (Tr. 1455). No useful purpose would thus be served by rehashing all of PRB's mischaracterizations and non sequiturs contained in its claims.

36. PRB also would fault Witness Raymond for not remembering exactly when Capitol's new computer system was installed, in light of its cost. (PRB Findings at ¶30). Again, this is sheer speculation; this was not Capitol's

only major capital expenditure at the time, and there is no reason to suppose that the cost of that system was large enough in the context of Capitol's business affairs to make the precise dates of its installation any more memorable.

37. PRB also improperly claims that Capitol has had a modem line "for 8 to 10 years that allows testing and any other function to be controlled from anywhere". (PRB Findings at ¶30). This is absolutely wrong. As Witness Harrison noted, the new computer system at Capitol enabled certain functions to be performed remotely that previously could only be done at the main office in Charleston. (Harrison Tr. 730). When Witness Raymond gave his testimony that PRB is referring to, he was discussing the time period of August 1992, when the duplicate transmissions occurred. (E.g., Raymond Tr. 815).

38. At that time it is undisputed that the new computer system had been installed; but it is a patent non sequitur to jump to the conclusion that the same capabilities for remote programming antedated the new computer system. Indeed, such a conclusion actually would be counterintuitive, because having the ability to do functions remotely through a modem line would ordinarily be one of the main reasons a modern new computer system would be purchased in the first place. In short, PRB once again has leaped to unfounded conclusions which it then uses as predicates for its argument.

39. PRB also fallaciously attempts to fault Witness Harrison for failing to mention Greenup County Rescue Squad to the inspectors as a reason for the tone transmissions. (PRB Findings at ¶32). What PRB fails to acknowledge, of course, is that the inspectors never asked Harrison about them. (Walker Tr. 1475).

40. Also typical of PRB's improper tactics is its claim that there is an inconsistency between Witness Raymond's June 1992 response to the Commission's Section 308(b) request and Witness Harrison's subsequent oral and written testimony concerning the night the automatic testing function was left on all night. (PRB Findings at ¶35). The rules of evidence explicitly require that when a party seeks to impeach a witness through a prior inconsistent statement, the witness must be confronted with the statement and provided an opportunity to explain it. FRE 613(b). PRB did not do so and its attempt to impeach witnesses' testimony in this manner is patently improper. Further, examination of the document itself (PRB-11 at p. 3) does not support PRB's characterization of it in any event (PRB Findings at ¶35).

41. PRB also seeks, erroneously, to discredit Witness Raymond's testimony that Capitol was not operating its PCP system in November 1990, by pointing to his contemporaneous response to the FCC. (PRB Findings at ¶41). What PRB fails to do, of course, is to match the allegation to which Raymond was responding with Raymond's response itself.



42. Raymond categorically denied that Capitol was retransmitting pages from 152.51 MHz to 152.48 MHz, or that anyone acting on Capitol's behalf was doing so. (CAP-11 at p. 2). Contrary to PRB's apparent implication, there is absolutely no logical reason why Capitol needed to get into a discussion of whether its PCP system was operating or not. Capitol said what was necessary; the fact that PRB thinks something more should have been said does not raise any issue concerning the credibility of Raymond's subsequent testimony on the point at the hearing.

43. PRB also erroneously speculates that since Capitol did not call in Witness Peters to track down the "problem" as a result of RAM's 1990 complaint of interference, it bolsters PRB's conclusion that Capitol was the cause. (PRB Findings at ¶ 42). Again, PRB did not trouble to ask Raymond about this issue when he testified. The fact is that there is no evidence whatsoever that the relationship between Capitol and Peters was such that Capitol would necessarily call Peters in to consult in such situation. PRB's speculation to the contrary is patently uninformed and unwarranted.

44. In fact, contrary to PRB's speculation, the evidence shows that Witness McCallister, rather than Witness Peters, normally would be the person Capitol would use to check out such complaints. (E.g., Raymond Tr. 1015). Additionally, contrary to PRB's characterization, Witness